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Torts-Landowner's Liability - Common Law Distinctions between Trespasser, Licensee, and Invitee Prevail over Modern Trend

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RECENT CASES

TORTS-LANDOWNER'S LIABILITY—COMMON LAW DISTINCTIONS BETWEEN TRESPASSER, LICENSEE, AND INVITEE PREVAIL OVER MODERN TREND—Plaintiff commenced an action for injuries sustained when a railing attached to the basement entrance of defendant's building collapsed and caused her to fall into a basement stairwell. The building, located in a business district, had not been used for any commercial purpose in the twelve month period prior to the accident and the defendant claimed no knowledge of the defective condition of the railing. Plaintiff made no contention that she was on the defendant's premises for any purpose or interest of the defendant. The trial court granted defendant's motion for summary judgment after concluding that the Plaintiff was not an invitee, but rather was a trespasser or a bare licensee to whom the owner of property owes no duty other than to refrain from willfully or wantonly injuring her. On appeal, the Supreme Court of North Dakota affirmed the lower court's decision and *held* that the plaintiff was either a trespasser or a mere licensee, unable to recover under the "trap exception"[1] in the absence of proof that the defendant knew or should have known that the dangerous condition existed.[2] The Supreme Court of North Dakota also considered the rejection of the common law distinctions between trespasser, licensee, and invitee, but *held* that "those distinctions which in our state have been reasonably useful in the past"[3] should be retained and exceptions to the general rule made when necessary. *Werth v. Ashley Realty Co.*, 199 N.W. 2nd 899 (N. D. 1972).

The judicially created common law distinctions between trespasser, licensee, and invitee were formulated during the nineteenth century and limited the liability of landowners[4] as follows: "Generally, a landowner owed no duty to a trespasser or licensee except to refrain from willful injury, and owed to an invitee the

1. Werth v. Ashley Realty Co., 199 N.W.2d 899, 905 (N.D. 1972), *quoting* the discussion of the "trap exception" to the common law limited liability of land owners, found in 65 C.J.S. *Negligence* § 63(39) at 711-13 (1966).

2. Comment, 14 VILL. L. REV. 360, 360-61 (1969) (footnotes omitted).

3. *Id.* at 907.

4. The term "landowners" as used in this comment refers to and includes owners, occupiers and possessors of land.

duty to inspect the premises to make them safe."[5] The history and development of the common law distinctions have received considerable attention from legal writers.[6] In *Kermarec v. Compagnie Generale Transatlantique*,[7] the United States Supreme Court traced the common law distinctions to a heritage of feudalism[8] and refused to apply these conceptual distinctions in a case involving admiralty law. The Supreme Court unanimously adopted the view of Chief Judge Clark in his dissent from the Second Circuit Court of Appeals opinion in *Kermarec*, where he made the following observation:

> Any discussion of the categories of invitee, licensee, and trespasser would be quite inadequate without the observation that these distinctions have been more and more obscured during the last century as courts have moved toward imposing on owners and occupiers a single duty of reasonable care in all the circumstances.[9]

Although the common law distinctions persist in a majority of American jurisdictions,[10] the past fifteen years have lent considerable support to Judge Clark's observation.

The history of the common law distinctions in North Dakota is presented by Justice Erickstad in *Werth*. The common law rule was first applied in North Dakota in 1898 in *O'Leary v. Brooks Elevator Co.*,[11] and was reaffirmed eighteen years later in *Costello v. Farmers' Bank of Golden Valley*.[12] However, there is no mention of section 979 of the Civil Code of Dakota of 1877, nor of any of its successors,[13] in either *O'Leary* or *Costello*, despite the fact that the plain meaning of this statute would seem to deny the application of the common law distinctions in North Dakota.[14] Judge Erick-

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5. Comment, 14 VILL. L. REV. 360 at 360-61 (1969) (footnotes omitted).
6. *See generally* 2 F. HARPER & F. JAMES, LAW OF TORTS 1430-1505 (1956); W. PROSSER, LAW OF TORTS 351-99 (4th Ed. 1971); RESTATEMENT (SECOND) OF TORTS, § 328E-350 (1965); 32 A.L.R.3d 509 (1970); 57 AM.JUR.2D *Negligence* § 38 (1971); 65 C.J.S. *Negligence* § 63 (1966); Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers*, 69 L.Q. REV. 182 (1953).
7. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959).
8. *Id.* at 630-31.
9. Kermarec v. Compagnie Generale Transatlantique, 245 F.2d 175, 180 (2d Cir. 1957).
10. Werth v. Ashley Realty Co., 199 N.W.2d 899, 904 (N.D. 1972).
11. O'Leary v. Brooks Elevator Co., 7 N.D. 554, 75 N.W. 919 (1898).
12. Costello v. Farmers' Bank of Golden Valley, 34 N.D. 131, 157 N.W. 982 (1916).
13. REVISED CODE OF N.D. § 3946 (1895); REVISED CODE OF N.D. § 3946 (1899); REVISED CODE OF N.D. § 5392 (1905); COMPILED LAWS OF N.D. § 5948 (1913); N.D. REVISED CODE § 9-10-06 (1943); N.D. CENT. CODE § 9-10-06 (1960). Derivation: CAL. CIV. CODE § 1714 (1872).
14. *See* N.D. CENT. CODE § 9-10-06 (1960) which has remained unchanged in substance since its inception in 1877:

> Willful acts and negligence—Liability.—*Everyone is responsible* not only for the result of his willful acts but also *for an injury occasioned* to another *by his want of ordinary care* or skill *in the management of his property* or person, except so far as the latter, willfully or by want of ordinary care, has brought the injury upon himself. The extent of the liability in such cases is defined by sections 32-03-01 to 32-03-19, inclusive. (emphasis added).

stad addresses this question in *Werth*[15] by relying upon the court's statement in *Ferm v. Great Northern Ry.*[16] that the statute was declaratory of the common law.[17] But, in *Ferm* there was no mention of the common law distinctions or their bearing on the negligence of the defendant, since the only issue decided in that case was the contributory negligence of the plaintiff. This fact, when coupled with the fact that the original version[18] of Section 9-10-06 of the North Dakota Century Code was part of the *civil* code of Dakota and was derived from and identical to Section 1714 of the California Civil Code,[19] would seem to indicate that Section 9-10-06 is declaratory of a civil law and not a common law principle.[20] Furthermore, the Supreme Court of North Dakota on at least one occasion has found it "[U]nnecessary to discuss liability from the standpoint of whether or not the plaintiff was technically a trespasser."[21] Thus it would appear that the common law distinctions as applied in North Dakota are susceptible to attack both statutorily and via judicial precedent.

In *Werth v. Ashley Realty Co.*,[22] it can be conceded that the application of the common law distinctions to the facts presented, and the accompanying rejection of the applicability of the "trap exception" to those distinctions,[23] was judicially sound, *if* the trespasser-licensee-invitee distinctions are accepted as being determinative of the defendant's liability. Thus the crucial issue in *Werth* was whether the common law distinctions should be retained or rejected. In addressing itself to this question the Supreme Court of North Dakota explored the rationale of a recent California decision,

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15. Werth v. Ashley Realty Co., 199 N.W.2d 899, 904 (N.D. 1972).
16. Ferm v. Great Northern Ry., 53 N.D. 543, 207 N.W. 39 (1926).
17. *Id.* at 42.
18. CIVIL CODE OF DAKOTA § 979 (1877).
19. CAL. CIV. CODE § 1714 (West Supp. 1973).
20. Fernandez v. Consolidated Fisheries, Inc., 98 Cal. App. 2d 91, 96 219 P.2d 73, 76 (1950). The Court stated:

> The law in reference to the duty owed to trespassers, licensees and invitees has largely developed in reference to the duty of an owner or occupier of real property or structures thereon. The statutes of this state do not provide that a different duty is owed to persons in the three named categories. *The only relevant statute is section 1714 of the Civil Code*, which provides: "Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself." *In spite of this code section*, which has been in our law unchanged since 1872, and *which states a civil law and not a common law principle*, Code Napoleon § 1383; Louisiana Code 1808 § 2215, *our courts*, in some cases at least, and *in apparent disregard of the section, have followed the common law rule*, which purports to make precise and rigid distinctions as to the duty owed by the owner or occupier to invitees, licensees and trespassers. (emphasis added). *Id.* at 76.

21. Steinke v. Halvorson, 46 N.D. 10, 178 N.W. 964, 965 (1920).
22. Werth v. Ashley Realty Co., 199 N.W.2d 899 (N.D. 1972).
23. *Id.* at 906.

Rowland v. Christian,[24] and concluded: "[W]e should not abandon those distinctions which in our state have been reasonably useful in the past."[25] The court further stated: "We prefer to retain the categories and make exceptions to the general rule when necessary."[26] The court's analysis of its preference for the common law distinctions focused primarily on three areas.

The first of these areas, the applicability of North Dakota statutory law[27] to *Werth*, was discussed in light of the *Rowland v. Christian*[28] rationale. Regretably, the arguments advanced in Rowland were left unanswered by the North Dakota Supreme Court. In *Werth*, the court acknowledged that Section 1714 of the California Civil Code is identical with Section 9-10-06 of the North Dakota Century Code.[29] The court further noted that in *Rowland* the California Supreme Court had asserted that

> [E]xception should be made to the fundamental principle enunciated by Section 1714 only when clearly supported by public policy; a departure from that principle involves the balancing of a number of considerations; . . . and the common law distinctions have been repudiated by the jurisdiction of their birth (Occupiers' Liability Act 1957, 5 and 6, Eliz. 2 Ch. 31).[30]

The *Rowland* court stated at least one strong public policy argument[31] in favor of the standard of care of Section 1714 and also elaborated on the major considerations to be balanced before departing from this standard.[32] The *Werth* court gave no response

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24. Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968); 32 A.L.R.2d 496 (1968).
25. Werth v. Ashley Realty Co., 199 N.W.2d 899, 907 (N.D. 1972).
26. *Id.*
27. N.D. CENT. CODE § 9-10-06 (1960) which has remained virtually unchanged in the law of North Dakota since 1877.
28. Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968); 32 A.L.R. 3d 496 (1968).
29. Werth v. Ashley Realty Co., 199 N.W.2d 899, 906 (N.D. 1972).
30. *Id.* at 906-07.
31. Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 461 (1968) where the court states:
> A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. *Reasonable people do not ordinarily vary their conduct depending upon such matters*, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty.

Id. at 568.
32. *Id.* at 564.
> A departure from this fundamental principle involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the in-

to the balancing of considerations and offered no public policy arguments in favor of the common law classifications. Its only comment was that these distinctions "have been resonably useful in the past."[33]

The second area which merits additional attention grows out of the North Dakota Supreme Court's observation that "[T]he majority opinion in *Rowland* recognized that the same result could have been reached by carving out exceptions to the traditional rules."[34] After indicating its preference for this position, the *Werth* court drew support from Judge Burke's dissent in *Rowland*,[35] which also favored the traditional rules as being both reasonable and workable.

This rationale is strongly disputed in the *Rowland* majority opinion[36] and in *Mile High Fence Co. v. Radovich*.[37] In *Mile High Fence Co.*, Justice Kelly, writing for the majority, listed two reasons that compelled the Colorado Supreme Court to abandon the common law classifications: (1) that confusion and judicial waste are created by the system; and (2) that an inappropriate harshness is preserved by denying the jury a chance to apply changing community standards to a landowner's duties.[38] Justice Kelly lends credence to his statement that the traditional system creates confusion by citing one particular case[39] that was heard by the Colorado Supreme Court on four different occasions.

Further evidence of the confusion created by the common law distinctions is found in *Gould v. DeBeve*,[40] where Circuit Judge McGowan stated:

> [W]e are vividly reminded that the concept of trespass, like other legal abstractions, casts its net very widely indeed, and that meaningful classification for particular pur-

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jury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

33. Werth v. Ashley Realty Co., 199 N.W.2d 899, 907 (N.D. 1972).

34. *Id.*

35. Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968). Judge Burke, in discussing the common law distinctions, stated:

> They supply a reasonable and workable approach to the problems involved, and one which provides the degree of stability and predictability so highly prized in the law.

Id. at 569.

36. *Id.* at 567 where the court points to the complexity and confusion which has arisen from attempts to apply just rules in our modern society within the ancient terminology of the common law distinctions.

37. Mile High Fence Co. v. Radovich, 489 P.2d 308 (Colo. 1971).

38. *Id.* at 311-12.

39. Smith v. Windsor Reservoir & Canal Co., 78 Colo. 169, 240 P. 332 (1925), *rehearing denied;* Windsor Reservoir & Canal Co. v. Smith, 82 Colo. 497, 261 P. 872 (1927), *rev'd;* Smith v. Windsor Reservoir & Canal Co., 88 Colo. 422, 298 P. 646 (1931), *aff'd;* Windsor Reservoir & Canal Co. v. Smith, 92 Colo. 464, 21 P.2d 1116 (1933).

40. Gould v. DeBeve, 330 F.2d 826 (D.C. Cir. 1964).

poses can only begin after the catch, and not before. There are, obviously, trespassers and trespassers.[41]

Perhaps the confusion caused by the common law distinctions in North Dakota has thus far been *de minimis*. However, the number of directed verdicts and summary judgments granted in landowner's liability litigation in this state certainly substantiates the criticism that a North Dakota jury is not allowed to apply changing community standards to the landowner's duty.

The third and final area worthy of additional consideration finds its origin in the following statement by the Supreme Court of North Dakota: "We note at present no great trend in the *Rowland* direction."[42] The Court cites six cases in support of this contention,[43] all of which were decided after the decision in *Rowland*. It must be noted, however, that the *Rowland* decision was not mentioned in any one of the six opinions, and that all six decisions were handed-down without one single case going to the jury.

Since the *Werth* court failed to note a trend in the *Rowland* direction, the numerous decisions which have considered *Rowland* merit analysis. It is conceded that in addition to North Dakota, both Texas[44] and Massachusetts[45] have rejected the *Rowland* doctrine in favor of adherence to the common law distinctions. But in the other jurisdictions where the *Rowland* doctrine has been argued, the resultant trend is significant. Kentucky has rejected the common law as it relates to the attractive nuisance doctrine, citing Restatement (Second) of Torts § 339 and *Rowland* for support.[46]

The trend toward extending landowner liability is even more pronounced when the visitor is a social guest. In Michigan the status of any person either expressly or impliedly invited for any purpose is that of an invitee to whom the landowner owes a duty

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41. *Id.* at 829.

42. Werth v. Ashley Realty Co., 199 N.W.2d 899, 907 (N.D. 1972).

43. *Id.* The cases cited are: Mion Construction Co. v. Rutledge, 123 Ga. App. 777, 182 S.E.2d 500 (1971); Cook v. Demetrakas, 275 A.2d 919 (R.I. 1971); Osterman v. Peters, 260 Md. 313, 272 A.2d 21 (1971); Arbogast v. Terminal Railroad Assn. of St. Louis, 452 S.W.2d 81 (Mo. 1970); Engel v. Friend's Hospital, 439 Pa. 559, 226 A.2d 685 (1970); Brewer v. Annett, 86 Nev. 700, 475 P.2d 607 (1970).

44. Buchholz v. Steitz, 463 S.W.2d 451 (Tex. Civ. App. 1971). The court, in reference to the *Rowland* doctrine stated: "[W]e would not be disposed to take so drastic a step, even if we thought we had authority to do so." *Id.* at 454. *But see* Dezendorf Marble Co. v. Gartman, 333 S.W.2d 404 (Civ. App. 1960) *aff'd*, 161 Tex. 535, 343 S.W.2d 441 (1961). The court limited the applicability of the atraction requirement to attractive nuisance *liability* of landowners, thereby extending the attractive nuisance doctrine.

45. Burns v. Turner Construction Co., 402 F.2d 332 (1st Cir. 1968). The court stated that even though the traditional distinctions between licensees and invitees had eroded in some jurisdictions, including California. "[I]t has retained undiminished vitality in Massachusetts. *Id.* at 335.

46. Louisville Trust Co. v. Nutting, 437 S.W.2d 484, (Ky. Ct. App. 1968). The court stated: "Whether such children are classified as trespassers, licensees or invitees is not a controlling situation." *Id.* at 485.

of reasonable care.[47] The State of Washington has placed a similiar duty upon the landowner with respect to a person on the land with his permission.[48] And New York has indicated a strong desire to abolish the social guest status as being that of a bare licensee, although a subordinate court felt bound by precedent to retain the common law status of the plaintiff in *Sideman v. Guttman*.[49]

The trend in the Rowland direction becomes more pronounced where the invitee-licensee distinction is in question. In Florida, the trend towards the sound view that there is no absolute rigid line separating invitees, licensees, and trespassers has been acknowledged[50] and the distinction between licensees and invitees has been rejected in favor of the *Rowland* doctrine that a determination of a duty of reasonable care depends on all the circumstances of the case.[51] Ohio has also taken a dim view of the common law rule regarding licensees, at least to the extent that it involves static and active conditions.[52] Minnesota has recently abolished the traditional distinctions between licensees and invitees,[53] declining to extend that abolition to include trespassers primarily because that issue was not before the court.[54] Iowa likewise has not only shown an outward dissatisfaction with the common law distinctions,[55] but has refused to allow them to be determinative of a landowner's

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47. Preston v. Sleziak, 16 Mich. App. 18, 167 N.W.2d 477 (1969).

48. Potts v. Amis, 62 Wash. 2d 777, 384 P.2d 825 (1963).

> We hold that, an owner or occupier of land has a duty to exercise reasonable care to avoid injuring a person who is on the land with his permission and of whose presence he is, or should be, aware.

Id. at 831.

49. Sideman v. Guttman, 38 A.D. 2d 420, 330 N.Y.S.2d 263 (1972). Justice Shapiro, writing for the majority of the court, stated:

> In my opinion "reason and a right sense of justice" cry out for the abolition by the Court of Appeals of the social guest rule. Nevertheless, as a subordinate court bound by existing precedents established by the highest courts of our State, we must affirm the judgment here appealed from.

Id. at 273.

50. Post v. Lunney, 261 So.2d 146 (Fla. 1972).

51. Camp v. Gulf Counties Gas Co., 265 So.2d 730, 731 (Dist. Ct. App. Fla. 1972).

52. De Gildo v. Caponi, 18 Ohio St. 2d 125, 247 N.E.2d 732 (1969). In affirming a lower court judgment for the plaintiff the court said: "Thus, in this case we abjure distinctions between *static* and *active* conditions which have been considered relevant in cases involving licensees." *Id.* at 735. The Ohio Supreme Court chose to defer to a later day and another case the question of eliminating distinctions based upon the status of the visitor upon the premises. Perhaps this deferral is more justifiable in *De Gildo*, where the plaintiff was not denied recovery on the basis of status, than in *Werth* where the plaintiff's status was fatally determinative.

53. Peterson v. Balach, 199 N.W.2d 639 (Minn. 1972). The Supreme Court of Minnesota reversed a directed verdict for the defendant, stating: "We herewith abolish the traditional distinctions governing licensees and invitees but decline to rule on the question of a landower's duty toward trespassers." *Id.* at 642.

54. *Id.* The court stated that common law rules "[S]hould not be summarily abrogated except in an adversary setting after a thorough and careful presentation by litigants who have a stake in the outcome."

55. Ives v. Swift & Co., 183 N.W.2d 172 (Ia. 1971). Judge Becker in a concurring opinion refers to *Rowland* and states:

> In that case the court entirely discarded the fictitious common law distinctions based on the injured party's status as a trespasser, licensee, business invitee, social invitee and the like. I submit we should do likewise.

Id. at 178.

liability.[56] In Mississippi, the adoption of a reasonable care standard was considered and rejected, but the door was left open for future abandonment of the common law triad.[57] Finally, in addition to California's rejection of categories in *Rowland*, Hawaii[58] and Colorado[59] have also done away with the common law distinctions and the United States Supreme Court has refused to apply them to admiralty law.[60] Perhaps the entire trend was best summed up by Chief Judge Bazelon in his concurring opinion in *Levine v. Katz*[61] when he said:

> But in my view our decision does not depend upon adherence to the outmoded 'invitee-licensee-trespasser trinity.' The Supreme Court, several states, and England have all recognized that the common-law classifications and their progeny of subclassifications are discordant with the realities of modern living.[62]

In conclusion that trend in tort law which favors the substitution of a broad test of reasonable care over the more technical test of status[63] is gaining prevalence in the area of landowner's liability. The decision in *Werth v. Ashley Realty Co.*[64] is contra to this modern trend and must be read with three observations in mind: (1) North Dakota's statutory provisions in Section 9-10-06 are historically and textually identical to those of California's Section 1714, and as such are neither declaratory of the common law nor subject to the application of the common law distinctions via judge-made exceptions, absent a stronger public policy argument than that presented in *Werth*; (2) the complexity and confusion arising

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56. Roseneau v. City of Estherville, 199 N.W.2d 125 (Ia. 1972). After discussing the rejection of categories (in *Rowland* and other cases), the Restatement (Second) of Torts position, and Prosser's position, the court said: "Therefore ,in the case before us, whether Willy was a trespasser, licensee, or invitee was not controlling." *Id.* at 136.

57. Astleford v. Milner Enterprises, Inc., 233 So.2d 524 (Miss. 1970). After postponing the rejection of the traditional categories, Justice Inzer states:

> It is the thinking of this writer, but not necessarily that of the Court that this area of law merits further study in the light of present day conditions and it may well be that this Court will in the future abandon the traditional distinctions between trespassers, licensees, and invitees. . . .

Id. at 526.

58. Pickard v. City and County of Honolulu, 51 Hawaii 134, 452 P.2d 445 (1969). In a very brief opinion, the Court stated in part:

> We believe that the common law distinctions between classes of persons have no logical relationship to the exercise of reasonable care for the safety of others. We therefore hold than an occupier of land has a duty to use reasonable care for the safety of all persons reasonably anticipated to be upon the premises, regardless of the legal status of the individual.

Id. at 446.

59. Mile High Fence Co. v. Radovich, 489 P.2d 308 (Colo. 1971).

60. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959).

61. Levine v. Katz, 407 F.2d 303 (D.C. Cir. 1968).

62. *Id.* at 305.

63. 32 A.L.R.2d 508, (1970). The writer includes the areas of charitable or governmental immunity, master-servant liability, and products liability as examples of areas where this trend may be observed (footnotes omitted).

64. Werth v. Ashley Realty Co., 199 N.W.2d 899 (N.D. 1972).

from the continued use of outmoded common law distinctions, together with the resulting usurpation of the jury function[65] via directed verdicts and summary judgments for the landowner, point out the need for the abandonment of these distinctions and their numerous exceptions; (3) the trend in the direction of *Rowland v. Christian*[66] is a viable trend which has not only been recognized in Hawaii and Colorado but also in several other states, including Minnesota and Iowa, even though none of these states could rely on the additional statutory support available in North Dakota. Furthermore, there is no need to await legislative action before rejecting the rigid common law distinctions and exceptions in North Dakota. These distinctions have been judicially created and have outgrown their usefulness in a modern society. There is no sound reason why North Dakota should not acknowledge the *Rowland* trend and adopt it.

GARY R. THUNE

DAMAGES—MENTAL SUFFERING—RECOVERY DENIED FOR ONE WITNESSING INJURY TO THE PERSON OF ANOTHER WHEN NOT WITHIN THE ZONE OF DANGER—The parents of a new-born baby commenced an action for damages against the defendant hospital alleging emotional and mental shock suffered by the mother as a result of witnessing her child dropped to the tiled floor of her hospital room by an employee of the hospital. The prayer for relief included additional medical expenses required for the child's care and hospitalization of the mother during this period.

On a motion for summary judgment, the trial court dismissed the part of the complaint seeking damages for the mother's emotional and mental shock. In hearing the plaintiff's appeal,[1] the

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65. 44 N.Y.U.L. REV. 426 (1969). In discussing the restriction placed on the province of the jury by the common law classifications, the writer states:

> Where such cases do reach the jury, it is often for consideration of the plaintiff's status rather than for the more fundamental question of whether defendant has acted carelessly. Thus the jury is deprived of the flexibility necessary to allow it to assess the burden of liability on the facts of each case in accord with community standards. Furthermore, injustice may result from the possibility that meritorious claims may never be brought because the prudent advocate recognizes that recovery will be denied before he is allowed the opportunity to demonstrate the unreasonableness of the defendant's conduct.

Id. at 430-31 (footnotes omitted).

66. Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968).

1. The defendant moved for dismissal on the ground that there was a delay in perfection of the appeal. The court denied the motion, citing Hogan v. Knoop, 191 N.W.2d 263, 264 (N.D. 1971) which held that if delay has not resulted in prejudice to the respondent the motion will be denied. Whetham v. Bismarck Hospital, 197 N.W.2d 678, 679 (N.D. 1972).